87-2048 ①

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TEXACO INC.,

Petitioner,

—vs.—

RICKY HASBROUCK, d/b/a RICK'S TEXACO, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 14, 1988

QUESTIONS PRESENTED

1. Whether the Robinson-Patman Act is violated if a manufacturer merely sells to wholesalers at a lower price than to retailers (so as to enable wholesalers to perform their role of reselling to retailers and earn a profit), unless the manufacturer selling to both levels of trade (wholesale and retail) either:

(a) Discriminates in price among its wholesalers, selling to each wholesaler at a price that would only cover the particular wholesaler's costs (assuming they were determinable), or

(b) Otherwise polices and controls each wholesaler's prices to its retail customers to assure that the wholesaler does not resell to retailers at a lower price than the manufacturer?

2. Whether the *Morton Salt* "self-evident" inference of injury to competition from sales over time to competing customers at different prices (334 U.S. at 50) has any application to the age-old practice of selling to wholesalers at lower prices than to retailers?

3. Under the Robinson-Patman Act and Section 4 of the Clayton Act, where the allegedly favored customer is a wholesaler, the allegedly disfavored customer a retailer, and the purported illegal price discrimination is the discount given all wholesalers, may the retailer predicate injury and recover treble damages on the basis of how much better off he would have been had he too received the wholesaler discount in whole or part?

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LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were petitioner Texaco Inc. and respondents Ricky Hasbrouck, d/b/a Rick's Texaco, James O. Sills, Alva N. Blue, John W. Bevan, Ricky A. Rigg, Gene C. Robinson, Mollie J. Robinson, Albert E. Allen, Harold C. Harwick, Henry Rigg, Vincent Lies, and Ralph O. Webber.

The affiliates and subsidiaries of Texaco Inc. listed on its most recent Form 10-K filed with the Securities and Exchange Commission are as follows:

Getty Oil Company
Riverway Gas Pipeline Company
Texaco Pipeline Inc.
Texaco Producing Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
The Texas Pipe Line Company
Deutsche Texaco AG
Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.-Productos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company

Texaco Trinidad, Inc.
Texas Petroleum Company
Texaco Butadiene Company
Texaco Chemical Company
Texaco Canada Inc.
Texaco Canada Resources Ltd.
Texaco Canada Resources
Getty Marine Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.

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OPINIONS BELOW

The Amended Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 842 F.2d 1034 and is reprinted as Appendix A. The Opinion of the District Court for the Eastern District of Washington is reported at 634 F. Supp. 34, and is reprinted as Appendix B.

JURISDICTION

The original Opinion of the Court of Appeals for the Ninth Circuit was entered on October 26, 1987. Following a timely petition for rehearing, the court of appeals entered an Amended Opinion on March 17, 1988 and denied the petition for rehearing on that date. The Order denying the petition for rehearing is set forth as a preface to the Amended Opinion. (A-4).[1]

This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ."

Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), provides in pertinent part:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."

1 References to "A" are to Appendix A, the Court of Appeals Opinion; references to "B" are to Appendix B, the District Court Opinion; references to "ER" are to the Excerpts of Record in the Court of Appeals.

STATEMENT OF THE CASE

The critically important issue raised by this case is whether a claim of unlawful price discrimination under the Robinson-Patman Act can be maintained by retailers against a manufacturer because the manufacturer sells to its wholesalers at a lower price than it charges the retailers. The court of appeals answered the question as follows:

> "That all wholesalers were offered the same discount would be an appropriate defense in a case where the plaintiff and other customers of the defendant were all wholesalers performing at the same level in the chain of distribution. *Here, however, only the other customers are wholesalers; the plaintiffs are retailers* who are further down the chain of distribution. The injury occurs at the latter level and results from the receipt by wholesalers of a functional discount in excess of the value of the services they perform, all or a portion of which they then pass on to the retailers they supply.
>
> * * *
>
> Despite the fact that Dompier and Gull, at least in their capacities *as wholesalers, did not compete directly with Hasbrouck*, a section 2(a) violation may occur if (1) *the discount they received was not cost-based* and (2) *all or a portion of it was passed on* by them to customers of theirs who competed with Hasbrouck." (A-7 to A-8) (emphasis added).

The court went on to find a violation by Texaco under the standard it had enunciated. In doing so, the court expressly noted its strong disagreement with the contrary view expressed by the Federal Trade Commission:

> "[I]f the position of the Federal Trade Commission is that charging lower prices to a wholesaler than to a retailer can never support a claim under the Act, *see Matter of Boise Cascade Corp.*, 50 Antitrust & Trade Reg. Rep. (BNA) 335, 336 (FTC Feb. 11, 1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988), we strongly disagree." (A-9).

In addition to its importance as a matter of antitrust law, the court of appeals' resolution of the question is of enormous practical consequence since it goes to the very heart of the marketing system employed by most manufacturers in this country. If allowed to stand, the decision below imperils the continued stability of wholesaling. The issue presented is thus of exceptional national significance meriting review by this Court.

A. Statement of Facts

Respondent Hasbrouck and eleven other retail service station owners ("Hasbrouck" or "plaintiffs") in the Spokane area purchased gasoline directly from petitioner Texaco Inc. ("Texaco") and resold it at retail under the Texaco trademark. (A-4). During the relevant period (1972 to 1981), Texaco also sold gasoline in the Spokane area to two independent wholesalers, who resold that gasoline to independent retail service stations. (A-5). One such wholesaler, Dompier Oil Company ("Dompier"), sold the gasoline to retailers under the Texaco trademark. (*Id.*)[2] It is the sales to Dompier, and then by Dompier to its customers, and then by those customers to the motoring public, that are the subject of this claim of price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13(a).

The wholesaler and retailers operated at different functional levels and were not competitors.[3] Plaintiffs, however, claimed to be impacted by the lower price charged the wholesaler—from 2.65 cents to 3.95 cents per gallon lower than retail. (ER 33 at

2 The other wholesaler, Gull Oil Company, did not resell under the Texaco brand. (A-5). Hasbrouck did not seek any damages for Texaco's prices to Gull (B-15; ER 386, 424-25), and no Gull stations were alleged to have caused compensable damages to any plaintiff. Texaco's sales to Gull are thus not of present significance.

3 Thirty months into the damage period, Dompier, in addition to being a wholesaler, acquired its first retail service station and then over the years acquired a few others (B-4 n.4), continuing to act as a pure wholesaler to twelve independent retailers (ER 34-35). Plaintiffs did not distinguish between these two periods, conceding that *if* it was lawful for Texaco to sell to Dompier at the price charged all wholesalers during the thirty month period in which Dompier was nothing but a wholesaler, judgment must be for Texaco. (ER 529-30).

¶ 25). At times, Dompier independently[4] decided to sell to some of its retail service station customers at prices below those Texaco was then charging its direct-supplied retailer customers,[5] and thus passed along some or all of the wholesaler discount to its customers. These independent retailers in turn sometimes sold to the motoring public at lower prices[6] (although never less than "two to three cents higher than the price Hasbrouck paid Texaco" (A-9)), thereby arguably passing along some or all of the original wholesaler discount to the public.

Texaco was just one of many gasoline sellers in Spokane and, concededly, competitive intensity increased over the 1972-81 period. (ER 165, 178, 236-41, 288-89, 295-96, 334). Plaintiffs acknowledged that their businesses were injured by, among other things, entrance into the market of new, high-volume self-serve or mini-serve stations (ER 186B, 230, 303-08), the advent of higher mileage-per-gallon automobiles (ER 402), and entrance into the market of well-known entities, such as Sears or Midas Mufflers (ER 403A-03B).

4 Apart from giving Dompier the discount it gave all wholesalers, there was no claim that Texaco had any responsibility for Dompier's pricing decisions.

5 At other times, Dompier charged the same as, or more than, Texaco charged Hasbrouck. (Ex. 5401). For example, exhibit 5401 shows that between February 1974 and June 1979, plaintiffs paid Texaco less than or the same as the price paid by Dompier's retail customers to Dompier at least 82% of the time.

6 At trial, plaintiffs conceded that, absent any price discrimination, the marketplace demanded a 4 to 10 cent retail price differential between full service and self-service gasoline. (ER 242-43, 306, 405-09). Stations supplied by Dompier resold their gasoline at self-service or mini-service facilities and, not surprisingly, at 4 to 10 cents below the full service prices charged at the full service stations operated by the plaintiffs. (ER 155-62, 191-94, 200-09, 213, 219, 242-43, 298, 302, 306, 311-12, 315, 405-09). It was these self- and mini-service prices of Dompier customers that were contrasted at trial with the plaintiffs' full service prices. (ER 393).

B. Prior Proceedings

The Complaint was filed on January 30, 1976. Following trial in the United States District Court for the Eastern District of Washington in which the jury found for plaintiffs, the district court, on March 26, 1980, granted Texaco's motion for judgment n.o.v. *Hasbrouck* v. *Texaco Inc.*, 1980-2 Trade Cas. (CCH) ¶ 63,343 (E.D. Wash. 1980). The district court (per Callister, J.) found that the amount of discrimination was not a proper measure of damages, and that the holding to the contrary in *Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), had been implicitly overruled by this Court in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), and was no longer the law. Following Judge Callister's decision, this Court, in *J. Truett Payne* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), expressly rejected "automatic damages" in price discrimination cases on the basis of *Brunswick*, as Judge Callister had correctly recognized.

The court of appeals nevertheless reversed and remanded for a new trial, taking the view that Judge Callister had to follow *Fowler* until this Court's *J. Truett Payne* decision. *Hasbrouck* v. *Texaco Inc.*, 663 F.2d 930 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982).

At the new trial, which commenced before Judge Quackenbush on June 4, 1985, the damage period was extended to cover 1972 through 1981. Plaintiffs conceded that if Texaco's conduct was lawful for any portion of the 1972-1981 period—including the period before July 1974 when Dompier functioned solely as a wholesaler—judgment was to be entered for Texaco. (ER 529-30). The district court, *inter alia*, permitted the jury to find injury and damages on the basis of the plaintiff-retailers not receiving the wholesaler discount. The district court denied motions for judgment notwithstanding the verdict or a new trial (Appendix B) and judgment was entered for threefold the verdict, $1,349,700. The court of appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. Until the decision below, it was lawful to sell to wholesalers below the price charged retailers. The decision puts in question the normal pricing practices of countless businesses across the country and jeopardizes the continued role of wholesalers in the American economy. It is thus of exceptional national importance, meriting the grant of certiorari.

Heretofore, a supplier was in compliance with the Robinson-Patman Act if it sold to retailers at a uniform retailer price and sold to wholesalers at a uniform wholesaler price that was lower. Now, for the first time in the more than fifty-year history of the Robinson-Patman Act, a supplier is held liable for *not* discriminating in price among its wholesalers.[7] Treble damage liability is imposed on the supplier for injuries caused by the decisions of an independent wholesaler and its independent retailer-customers to lower their own prices—decisions which the supplier may not control without violating the Sherman Act, 15 U.S.C. § 1.

In calling for suppliers to sell at different prices within the wholesale level of trade based upon each wholesaler's costs, the decision departs from established precedent, from practicality, and from Congressional intent, and conflicts with the decisions of the Federal Trade Commission and of other Circuits, including the recent decision of Judge Arnold in *White Industries, Inc.* v. *Cessna Aircraft Co.*, 1988-1 Trade Cas. (CCH) ¶ 67,992 (8th Cir. 1988).

2. The decision of the court of appeals also merits review by this Court because it conflicts with the recent majority opinion of the Court of Appeals for the District of Columbia in *Boise*

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7 The court of appeals took the position that while a supplier that sells to all wholesalers at a uniform price is insulated from price discrimination claims by any wholesaler, treating wholesalers equally can violate the Robinson-Patman Act if the plaintiff is a retailer. Under the Ninth Circuit view, if the plaintiff is a retailer, the supplier may be guilty of price discrimination unless the supplier can show it discriminated in its prices among wholesalers on the basis of each wholesaler's varying costs of doing business. (A-7 to A-9).

Cascade Corp. v. *FTC*[8] with regard to the increasingly important and controversial question of how the statutory requirement of competitive injury is to be established where the favored and disfavored purchasers are not entirely on the same level of trade. In *Boise Cascade*, the favored customer was a "hybrid," receiving a wholesaler discount but selling at both the wholesale and retail levels. The majority of the D.C. Court of Appeals held that this Court's *Morton Salt*[9] "self-evident" inference of injury from long-standing and significant discrimination between purchasers competing at the same level of trade should not be mechanically applied. Instead, it required consideration, as well, of evidence that the price differential actually adversely affected competition in the context of the peculiar facts of that industry. Because the favored customer was not just a retailer but also at least in part, a wholesaler, "[t]his case is simply not of the lineage of *Morton Salt*." 837 F.2d at 1139 n.14.

Here, where Robinson-Patman liability was sought to be imposed for the traditional practice of selling to a pure wholesaler at lower prices than to retailers, plainly no "self-evident" inference of lessening of competition may be drawn. Yet, in contrast to *Boise Cascade*, the court below mechanically misapplied the *Morton Salt* inference and held that a reasonable possibility of injury to competition could be found from sales over time to wholesalers at lower prices than retailers.[10]

3. Also compelling review is the reintroduction of "automatic damages" by the Ninth Circuit in the face of the emphatic rejection of such a basis for recovery by this Court.[11]

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8 837 F.2d 1127 (D.C. Cir. 1988).

9 FTC v. Morton Salt Co., 334 U.S. 37, 50 (1948).

10 "It is undisputed that a price differential existed between the rate Texaco charged Hasbrouck [the retailer] and the rate it charged Dompier and Gull [the wholesalers]. Furthermore, there was evidence that the price differential was substantial and it was in effect for several years. There can be little doubt that Texaco's pricing policy constituted price discrimination that was unlawful unless it could be justified under the Act." (A-11 to A-12).

11 J. Truett Payne v. Chrysler Motors Corp., 451 U.S. 557 (1981).

Indeed, the damages below exceeded the measure of "automatic damages"—the difference between the prices paid by Hasbrouck and those paid by his competitors, Dompier-supplied retailers (to whom Dompier at times may have passed along some portion of its wholesaler discount). Rather, the jury was allowed to find that the plaintiff-retailers were injured to the full extent of the discount given the wholesalers. Unless the damage approach below is corrected, it may well be pursued in every Robinson-Patman case, with the potential for wholly unwarranted, enormous recoveries.

I. It Is Not Illegal for a Supplier to Sell to Wholesalers at a Uniform Wholesaler Price Lower than Its Price to Retailers.

Throughout the history of the Robinson-Patman Act, it has been recognized that wholesalers require lower prices than retailers (to enable them to perform their function of reselling to retailers and earn a profit) and that compliance with the Act is assured by selling to all purchasers in the wholesale class of trade at a uniform price that is not higher than the price to retailers. This is exemplified by the very Order affirmed by this Court in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), which prohibited different prices among wholesalers and among retailers, but allowed different pricing between the two levels of trade so long as retailers were not charged less than wholesalers.[12]

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12 "The prohibiting paragraphs of the order were:

'(a) By selling such products to some wholesalers thereof at prices different from the prices charged other wholesalers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five cents per case which do not tend to lessen, injure, or destroy competition among such wholesalers.

'(b) By selling such products to some retailers thereof at prices different from the prices charged other retailers who in fact compete in the sale and distribution of such products; provided, however, that this shall not prevent price differences of less than five

This Court, in *FTC* v. *Sun Oil Co.*, 371 U.S. 505 (1963), succinctly summarized Congressional intention in enacting the Robinson-Patman Act:

> "In short, Congress intended to assure, to the extent reasonably practicable, that businessmen *at the same functional level* would start on equal competitive footing so far as price is concerned." 371 U.S. at 520 (emphasis added).[13]

It has always been fundamental that businesses at higher functional levels could, and necessarily would, start at lower price footings.[14] Responding to the obvious importance of having a clear demarcation line between the lawful and the unlawful to permit normal structuring of distribution arrangements, the Federal Trade Commission (the agency with principal responsibility for Robinson-Patman enforcement) and the courts have firmly drawn such a line—so long as a wholesaler is acting as a wholesaler (selling to retailers):

> "the difference in the prices that the wholesaler and retailer pay *cannot support* a claim of secondary line competitive injury under the Act." (emphasis added).[15]

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cents per case which do not tend to lessen, injure, or destroy competition among such retailers.

'(c) By selling such products to any retailer at prices lower than prices charged wholesalers whose customers compete with such retailer.' " 334 U.S. at 51 n.19.

13 See also Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 12 (1976) ("focus of Robinson-Patman is on competition 'at the same functional level' ").

14 "[T]he competitive effects requirement permits a supplier to quote different prices between different distributor classes—so long as those who are higher up (nearer the supplier) on the distribution ladder pay *less* than those who are further down (nearer the consumer)." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 174 (1962) (emphasis in original).

15 Boise Cascade Corp., [1983-87 FTC Complaints and Orders Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,330 at p. 23,394 (1986). In re-

It is this very clarity that the court below explicitly undermines (A-9 to A-10) by establishing a rule of law under which a supplier could never know whether its sales to wholesalers were lawful because legality would depend on what the supplier could neither know nor control—each wholesaler's "costs" and independent pricing decisions.

Moreover, the holding that a supplier should discriminate among its wholesalers on the basis of wholesaler "costs" flatly conflicts with long-established legal principles.[16] The recent opinion of Circuit Judge Arnold writing for the Eighth Circuit Court of Appeals is directly on point:

> "The Robinson-Patman Act proscribes discriminatory pricing, not pricing which fails to discriminate between [purchasers] with unequal costs at the same level of distribution." *White Industries, Inc.* v. *Cessna Aircraft Co.*, *supra*, 1988-1 Trade Cas. (CCH) at p. 58,086 n.4.[17]

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versing the Commission's expansive view of the competitive injury standard, the Court of Appeals cast no doubt on the above. Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988). *See also*, with respect to the clear legality of selling to wholesalers at less than to retailers, White Industries, Inc. v. Cessna Aircraft Co., 1988-1 Trade Cas. (CCH) ¶ 67,992 (8th Cir. 1988); Edward J. Sweeney & Sons, Inc. v. Texaco Inc., 637 F.2d 105, 120-22 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1024 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

16 *E.g.*, Mueller Co. v. FTC, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964) (cost-based price differences within same level of trade are discriminatory).

17 In *White Industries*, the dealer urged, *inter alia*, that lower prices to distributors were discriminatory because they impaired a dealer's ability to sell to other dealers in competition with distributors. In rejecting this claim, Judge Arnold observed:

> "Dealers like White who desire to compete in selling to *other dealers* will of course suffer a cost disadvantage compared with distributors, but to hold that the larger distributors' discount violates Section 2(a) in this circumstance would effectively abolish two-channel distribution systems in all industries. White cites no authority for this extraordinary interpretation of the Act, nor can we find any." 1988-1 Trade Cas. (CCH) at p. 58,086 (emphasis in original).

A rule requiring calibration of prices to wholesalers on the basis of each wholesaler's costs of wholesaling is also patently impracticable. These are costs which a supplier cannot be expected to know and which will vary from wholesaler to wholesaler and day to day.[18]

Nor, respectfully, was the court below correct in believing such a rule was required by this Court's decisions in *Morton Salt*,[19] *Perkins*[20] or *Falls City*[21]—none of which involved a claim that lower prices to wholesalers than retailers would violate the Act. Indeed, no case has so held and, in light of the Act's legislative history, it would be unreasonable to believe Congress intended any rule so destructive of wholesaling.[22]

II. The Fact That Wholesalers Have Been Charged Less than Retailers for a Long Time Does Not Warrant an Inference That Competition Thereby Has Been Lessened.

Liability was imposed below in the face of conceded evidence that competition was flourishing in the Spokane area. (See p. 5, *supra*). While the statute calls for proof that "the effect of such

18 As an independent business, each wholesaler makes its own decision about where to locate its facilities, what kinds of equipment to purchase and when to upgrade, what number and types of employees to hire and how best to compensate them, whether and how much to borrow, and where and when, what strategies to pursue to attract and retain customers, what amount of credit to extend to which customers, what time, effort and money to expend in helping its customers be successful, what products to handle, what size inventories to maintain of each, how frequently to make deliveries, and myriads of other matters—each of which can significantly impact cost.

19 FTC v. Morton Salt Co., 334 U.S. 37 (1978).

20 Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

21 Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983).

22 As described in F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 11 (1962), "the prototype of the Robinson-Patman Act originated with the United States Wholesale Grocers Association, whose members felt the [retail] chain stores' competitive pinch." The Association's counsel, H. B. Teegarden, "throughout the hearings . . . functioned as Mr. Patman's factotum—drafting, analyzing, and explaining for the legislators." *Id.* at 12 n.38.

discrimination may be substantially to lessen competition," the court below effectively read this requirement out of the Act by misapplying the so-called *Morton Salt* inference (A-11 to A-12) and allowing injury to competition to be *inferred* where the only purported wrongdoing by the manufacturer was having a price to wholesalers that was lower than the price to retailers.[23]

In adopting what is essentially a *per se* rule of illegality,[24] the court below minimized the importance of injury to competition, disparaging this Court's teaching from *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962) and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977)—that the antitrust laws were enacted for "the protection of *competition*, not *competitors*"—as an old "chestnut." (A-10).

It is well settled, however, that the Robinson-Patman Act is "directed to the preservation of competition. The statute's concern with the individual competitor is but incidental." *American Oil Co.* v. *FTC*, 325 F.2d 101, 104 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964). *See also, e.g.*, *Richard Short Oil Co.* v. *Texaco Inc.*, 799 F.2d 415, 420 (8th Cir. 1986); *Motive*

23 Such a price difference, as the legislative history indicates, may not even be considered a "discrimination," much less proof of lessening competition. Thus, Congressman Utterback, a manager of a bill that resulted in the Robinson-Patman Act, explained:

> "A discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment. . . . If the two are competing in the resale of the goods concerned, that relationship exists. . . . But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale to different customers at those different prices would not constitute a discrimination within the meaning of this bill." 80 Cong. Rec. 9416 (1936).

24 The additional factor—that an independent wholesaler passed along a portion of the wholesaler discount to retail customers—is one the manufacturer cannot control and must assume can always happen when it sells to independent wholesalers.

Parts Warehouse v. *Facet Enterprises*, 774 F.2d 380, 394-95 (10th Cir. 1985).[25]

Moreover, as mentioned above, the court of appeals in *Boise Cascade* explained why the *Morton Salt* "self-evident" inference should not be mechanically applied, even in the context of the *retail* business of a "hybrid" wholesaler/retailer.[26] *A fortiori*, an adverse effect on competition may not be inferred where the purchasers are entirely on different levels of trade.

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25 As a leading commentator on the Act observed, a "focus on detrimental effects on competition, rather than a concern with individual competitors, is fundamental to a reconciliation of the Robinson-Patman Act with overall antitrust policies." F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 130 (1962).

26 Judge Williams noted that there were pro-competitive advantages to continuing the wholesaler discount to a combined wholesaler/retailer, even where the "hybrid," as in *Boise Cascade*, acted overwhelmingly as a retailer:

> "A rule requiring suppliers to limit the discounts to items actually sold at wholesale would work to the detriment of Boise's purchasers, including dealers. Enforcement of such a rule would entail substantial administrative costs, *see* Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Ind. & Com. L. Rev. 543, 556 (1976) (a company that had insisted on certification of resale scrapped the requirement 'as unworkable because it was not adopted by its competitors, was resented by its customers, and resulted in falsehood and inaccuracy'), which would doubtless be passed on to customers. Because of these administrative costs, Commission insistence on such market segregation might well eliminate the use of functional discounts and the substantial efficiencies they generate for dealers. . . . The high administrative costs, as well as the tendency of the resulting efficiencies to spill over in sales to end users, likely account for sellers' disinclination to so restrict the discounts." 837 F.2d at 1152 n.7.

The dissent in *Boise Cascade* also makes clear that its concern was not with pure wholesalers receiving lower prices but where "a dual distributor chiefly functions in a retail capacity. . . ." 837 F.2d at 1162. Judge Mikva emphasized that in his view the case involved "competing retailers." *Id.* at 1152.

III. A Retailer May Not Predicate Competitive Injury and Treble Damages on the Basis of How Much Better Off He Would Have Been Had He Received a Wholesaler Discount.

Notwithstanding *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), the district court not only refused to charge that plaintiffs had to prove an actual impact upon competition to recover damages (ER 516), the jury was instructed that plaintiffs were *not* required to establish that the alleged discrimination in price actually injured competition (ER 542).[27] Instead, both for injury and damages, the focus was on whether and how much better off the plaintiff-retailers would have been had they received the wholesaler discount.

Such an approach, of course, is powerfully simple for a jury. It even strongly influenced the court of appeals, which referred to how much better off plaintiffs would have been "had they received as little as a two or three cents per gallon discount" (A-12) or "had they received a price break on their purchases of gasoline from Texaco" (A-14). However, while plaintiffs' desire for lower prices is relevant to a price-fixing case based on unlawful overcharges, it is not relevant to a Robinson-Patman case where the illegality is based on undercharging a favored purchaser. *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981).

The violation here purportedly consisted of not reducing the uniform wholesalers' discount to correspond to a particular wholesaler's potentially lower operating costs. With that as the purported antitrust violation, the focus had to be on its consequences and on what the situation would have been had the favorable price to the wholesaler been appropriately *increased*. No legal basis exists for restoring through the back door what *Truett Payne* prohibited—"automatic damages"—by arguing

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27 This error alone is sufficient to warrant a new trial. *E.g.*, Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 577 (5th Cir.), *cert. denied*, 459 U.S. 908 (1982); O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 347 (3d Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127 (1976).

and allowing a jury to conclude that a price *difference* may be eliminated not by increasing the wrongfully low price but by *reducing* someone else's, plaintiff's, price. The practical effect of the decision below is to vitiate *Truett Payne*.

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of certiorari be granted.

Dated: June 14, 1988

Respectfully submitted,

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APPENDIX A

Order and Amended Opinion of the United States Court of Appeals for the Ninth Circuit

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-4225

D.C. No. *CV-76-27-JLQ*

RICKY HASBROUCK, D B A RICK'S TEXACO, et al.,

Plaintiffs-Appellees,

v.

TEXACO, INC. a Foreign Corporation,

Defendant-Appellant.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, *District Judge*, Presiding

Argued and Submitted
October 2, 1986—San Francisco, California

Filed October 26, 1987
Amended March 17, 1988

Before:

OTTO R. SKOPIL, JR., ARTHUR L. ALARCON AND STEPHEN REINHARDT, *Circuit Judges.*

Opinion by Judge Reinhardt

SUMMARY

Antitrust

Appeal from denial of j.n.o.v. and of denial of a new trial. The court affirmed holding that substantial evidence supports the jury findings regarding Texaco's liability and damage award. The court denied the appellant's petition for rehearing and rejected the suggestion for a rehearing en banc.

Appellee Hasbrouck and others were Texaco retail service station dealers purchasing gasoline directly from appellant Texaco and reselling it at retail. Texaco also supplied gasoline to Dompier Oil Company and Gull Oil Company at prices between 2.5¢ and 5.75¢ per gallon lower than the price Hasbrouck paid. Hasbrouck sued charging Texaco with illegal price discrimination alleging that Texaco sold gasoline at substantially and unjustifiably lower prices to Dompier and Gull resulting in a lessening of competition. The jury agreed and awarded Hasbrouck damages. The district court then granted Texaco's motion for j.n.o.v. On appeal, this court found that precedent should have been followed and remanded the proceeding for a new trial. The jury again returned a verdict for Hasbrouck and damages were trebled. The court denied Texaco's motions for j.n.o.v. or a new trial.

[1] The Robinson-Patman Act prohibits the sale of like goods to different purchasers at a different price, where the effect of such price discrimination may be substantially to lessen competition. [2] Manufacturers are permitted to use price differentials

(functional discounts) to compensate certain classes of buyers for the distributional services they perform. [3] That all wholesalers were offered the same discount would be an appropriate defense. Here, however, only the other customers are wholesalers; the appellees are retailers. [4] Appellees offered evidence that the services performed by Gull and Dompier were insubstantial and did not justify the functional discount. [5] Hasbrouck also presented evidence that the price discount received by Gull and Dompier was passed on to retail competitors of Hasbrouck. [6] Although selling at different prices to customers who are at different levels of distribution will not constitute a violation of the Act, [7] here, the discount given to a customer higher in the distributive chain is sufficiently substantial and is unrelated to the costs of the customer's function. [8] Texaco claims that Hasbrouck failed to prove that the price discrimination resulted in injury to competition and instead presented evidence reflecting only injury to themselves as competitors. Injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. [9] The Act is violated upon showing that the effect of price discrimination may be substantially to lessen competition. Hasbrouck offered evidence showing that a substantial price discrimination existed and that harm to competition would be the likely result. [10] Appellees presented evidence showing that the injuries they suffered were precisely the type that would result from unlawful price discrimination and that they flowed from anti-competitive conduct thereby establishing antitrust injury under section 4 of the Clayton Act. [11] Despite Texaco's challenge, Hasbrouck has presented sufficient proof on the amount of damages. [12] In light of its broad discretion, the trial court did not abuse its discretion in formulating the jury instructions. [13] Finally, Texaco points to no extrajudicial basis for an alleged judicial bias. It offers no evidence that the trial judge acted less than in a wholly impartial manner.

COUNSEL

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Randall B. Robinson and Mark D. Litvack, White Plains, New York; Ira S. Sacks, Kaye, Scholer, Fierman, Hays & Handler, New York, New York; and William Fremming Neilson, Paine, Hamblen, Coffin, Brooke & Miller, Spokane, Washington, for the defendant-appellant.

ORDER

The panel has voted to deny the petition for hearing and to reject the suggestion for rehearing en banc. The full court has been advised that the following amended opinion would be filed. No judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The attached amended Opinion is ordered filed.

OPINION

Twelve service station owners successfully sued Texaco, Inc., for price discrimination under the federal antitrust laws. Texaco appeals the jury verdict and the district court's denial of its motion for judgment notwithstanding the verdict or, in the alternative, a new trial. We find that each of Texaco's arguments on appeal is without merit and, accordingly, affirm the decision of the district court.

I. *Background*

Ricky Hasbrouck and eleven other plaintiffs were Texaco retail service station dealers in the Spokane area; they purchased gasoline directly from Texaco and resold it at retail under the Texaco trademark.[1] Throughout the relevant time period Texaco also supplied gasoline to John Dompier Oil Company and Gull Oil Company at a price that was at various times between 2.5¢ and 5.75¢ per gallon lower than the price Hasbrouck paid. Dompier and Gull sold the gasoline they purchased from Texaco to independent retail service stations. Dompier sold the gasoline to retailers under the Texaco trademark; Gull marketed it under private brand names. Some of the retail stations supplied by Dompier and Gull were owned and operated by the suppliers' salaried employees.

Hasbrouck filed a complaint in 1976, charging Texaco with illegal price discrimination in violation of section 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (1982),[2] and seeking treble damages under section 4 of that act, 15 U.S.C. § 15(a) (1982).[3] Section 2(a) is commonly referred to as the Robinson-Patman Act. The complaint alleged that Texaco sold gasoline at substantially and unjustifiably lower prices to Dompier and Gull, and that this resulted in a lessening of competition. When the matter was tried initially, the jury found that Texaco had engaged in price discrimination in violation of section 2(a) and awarded Hasbrouck $849,484 in damages under section 4. The district court, instead of trebling the damages, granted Texaco's motion for judgment notwithstanding the verdict (j.n.o.v.); the court held that jury instructions regarding the measurement of damages, which were based on *Fowler Manufacturing Co. v.*

1 For convenience, we will hereinafter refer in most instances to the twelve plaintiffs collectively as Hasbrouck.

2 Section 2(a), as amended by the Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526 (1936), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

The appropriate remedy upon proof of a section 2(a) violation is an injunction prohibiting the unlawful price discrimination.

3 Section 4 of the Clayton Act provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . . ."

Gorlick, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970), were erroneous because *Fowler* was either distinguishable, impliedly overruled or bad law. On appeal, we found that *Fowler* should have been followed at the time of trial and remanded the proceeding back to the district court for a new trial on the issues of liability and damages; we instructed it that the new trial should be conducted in conformity with the Supreme Court's recent analysis of price discrimination damages in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981). *Hasbrouck v. Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982).

At the second trial, the jury again returned a verdict for Hasbrouck, this time in the amount of $449,900. This verdict was trebled by the court and judgment was entered in the amount of $1,349,700. Once again Texaco moved for a judgment n.o.v. or a new trial, but this time the district court denied the motion, finding that the jury's verdict was not contrary to the weight of the evidence and that Texaco failed to establish adequate grounds for a new trial. *Hasbrouck v. Texaco, Inc.*, 634 F. Supp. 34 (E.D. Wash. 1985). Texaco appeals.

II. *Discussion*

Texaco challenges several jury findings directly; it also bases its appeal from the district court's refusal to grant its motion for j.n.o.v. or a new trial on the alleged errors in those findings. An appellate court reviews a jury verdict only to determine whether it is supported by substantial evidence, that is, such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1013 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 802 (1986). A refusal to grant j.n.o.v. is proper when the evidence does not compel only one possible conclusion, the one advocated by the losing party. *Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 1642 (1986). A denial of a motion for a new trial is reviewed for abuse of discretion. *Robins v. Harum*, 773 F.2d 1004, 1006 (9th Cir. 1985).

A. *Proof of Price Discrimination Under Section 2(a)*

[1] Section 2(a) of the Clayton Act (the Robinson-Patman Act) prohibits the sale of like goods to different purchasers at a different price, where the effect of such price discrimination may be substantially to lessen competition, 15 U.S.C. § 13(a). Texaco challenges the jury's finding of liability under section 2(a) on two grounds, (1) that the admitted price differential was justified, and (2) that, in any event, the differential did not affect competition. We disagree with Texaco on both points. We address each in turn.

1. *Whether the Price Differential Was a Lawful Functional Discount.* Texaco argues that the price break afforded Dompier and Gull was a legitimate wholesale discount. It maintains that, because section 2(a) permits a manufacturer to offer wholesale discounts, the critical inquiry is merely whether the discount was equally available to all wholesalers.

[2] Manufacturers are permitted to use price differentials, commonly known as wholesale or functional discounts, to compensate certain classes of buyers for the distributional services they perform. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 43-44 (1948); 15 U.S.C. § 13(a); 3 E. Kintner & J. Bauer, *Federal Antitrust Law* §§ 20.14, 22.14 (1983). For this reason, goods may generally be sold to wholesalers at a lower price than that charged to retailers. However, the discount Texaco provided here does not qualify as a functional or wholesale discount. Moreover, Texaco is simply incorrect when it argues that it is absolved from Robinson-Patman liability if it can show that a particular discount was available to all wholesalers.

[3] That all wholesalers were offered the same discount would be an appropriate defense in a case where the plaintiff and the other customers of the defendant were all wholesalers performing at the same level in the chain of distribution. Here, however, only the other customers are wholesalers; the plaintiffs are retailers who are further down the chain of distribution. The inquiry occurs at the latter level and results from the receipt by wholesalers of a functional discount in excess of the

value of the services they perform, all or a portion of which they then pass on to the retailers they supply.

As the Supreme Court long ago made clear, and recently reaffirmed, there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers. *Morton Salt*, 334 U.S. at 43-44; *Perkins v. Standard Oil Co.*, 395 U.S. 642, 646-47 (1969); *Falls City Indus., Inc. v. Vanco Beverages, Inc.*, 460 U.S. 428, 434-35 (1983). Despite the fact that Dompier and Gull, at least in their capacities as wholesalers, did not compete directly with Hasbrouck, a section 2(a) violation may occur if (1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with Hasbrouck. *Morton Salt*, 334 U.S. at 43-44; *Perkins v. Standard Oil*, 395 U.S. at 648-49; *see* 3 E. Kintner & J. Bauer, *supra*, § 22.14.

[4] Hasbrouck presented ample evidence to demonstrate that both conditions were met. The plaintiffs offered evidence that the services performed by Gull and Dompier were insubstantial and did not justify the functional discount. For example, there was evidence that Gull had no bulk plant for temporary storage of gasoline and that its customers received direct deliveries from Texaco. This evidence supports the allegation that Gull's role as a middleman amounted only to engaging in paper transactions. The record also reflects that Texaco delivered gasoline directly to Dompier's customers in some instances. In addition, as the district court put it, Texaco made "no serious attempt" to provide a quantitative justification for its functional discount, instead "merely identifying some of the functions" that Dompier and Gull were said to have performed. 634 F. Supp. at 38.[4] In

4 Texaco does not argue that the services its wholesalers performed justified the amount of the discount and that, as wholesalers, Dompier and Gull were entitled to that discount whether or not they performed all of the customary wholesaler services. In any event, we express no view as to the merits of such an argument. We mention it only because of the emphasis that Texaco places on the claim that there was no evidence that Dompier and Gull were charged different prices than other wholesalers.

the face of Hasbrouck's evidence challenging the cost basis of the discount, Texaco's showing was clearly inadequate.

[5] Hasbrouck also presented sufficient evidence to support a finding that the 2.5¢ to 5.75¢ per gallon discount received by Gull and Dompier was passed on, at least in part, to retail competitors of Hasbrouck. There was documentary evidence that some retail stations operated or supplied by Dompier and Gull purchased gasoline at prices lower than those paid by Hasbrouck. There was also extensive testimony that, in order to stay in business, gasoline retailers needed a profit margin in the neighborhood of ten cents per gallon; yet, service stations operated or supplied by Dompier often sold gasoline at retail prices that were only two to three cents higher than the price that Hasbrouck paid to Texaco. This further tends to show that some portion of the discount was passed along. Because there was sufficient evidence that (1) the discount Texaco afforded Dompier and Gull was not justified by the services those companies performed, and (2) at least a portion of the discount was passed on to Hasbrouck's competitors, the jury could properly have concluded that there was an unlawful price differential.

[6] We recognize that, generally, selling at different prices to customers who are at different levels of distribution will not constitute a violation of the Robinson-Patman Act. *See Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 120 (3d Cir. 1980); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1024 (2d Cir. 1976); 3 E. Kintner & J. Bauer, *supra*, § 12.12, at 289-99. However, if the position of the Federal Trade Commission is that charging lower prices to a wholesaler than to a retailer can never support a claim under the Act, *see Matter of Boise Cascade Corp.*, 50 Antitrust & Trade Reg. Rep. (BNA) 335, 336 (FTC Feb. 11, 1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988), we strongly disagree.

[7] Where, as here, the discount given to a customer higher in the distributive chain is sufficiently substantial and is unrelated to the costs of the customer's function, the seller cannot claim immunity from Robinson-Patman liability. In such situations, the connection between the seller's price discrimination

and the adverse effect on competition is obvious and foreseeable, and a plaintiff may assert a cause of action against the seller even though he and the favored customer operate at different market levels. *See Perkins v. Standard Oil Company of California*, 395 U.S. 642 (1969); *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951). To hold that price discrimination between a wholesaler and a retailer could *never* violate the Robinson-Patman Act would leave immune from antitrust scrutiny a discriminatory pricing procedure that can effectively serve to harm competition. We think such a result would be contrary to the objectives of the Robinson-Patman Act.

[8] 2. *Whether the Price Differential Affected Competition.* Texaco also attacks the finding of section 2(a) liability by arguing that Hasbrouck failed to prove that the price discrimination resulted in injury to competition and instead presented evidence reflecting only injury to themselves as competitors. We disagree. The oft-quoted chestnut distinguishing between protecting competition and protecting competitors[5] has been misconstrued with some regularity by antitrust defendants who appear to argue in all types of antitrust cases that the effect of unlawful conduct on competitors is irrelevant. The purpose of drawing a distinction between harm to competition and harm to competitors is to point out that not all acts that harm competitors harm competition. However, the converse is *not* true. Injury to competition necessarily entails injury to at least some competitors. Competition does not exist in a vacuum; it consists of rivalry among competitors. Clearly, injury to competitors may be probative of harm to competition, although the weight to be attached to such evidence depends on its nature and on the nature of the challenged conduct. The aphorism may not be invoked blindly in response to a showing that competitors have been harmed; otherwise it would often serve to shield unlawful conduct that adversely affects competition.

5 Evidently, the phrase that the antitrust laws were enacted for "the protection of *competition*, not *competitors*" originated in *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original).

[9] With respect to price discrimination claims, the significance of proof of harm to competitors is particularly clear. Section 2(a) of the Robinson-Patman Act is a prophylactic statute, designed to prevent the occurrence of price discrimination rather than to provide a remedy for its effects. The section is violated upon a showing that "the effect of such discrimination may be substantially to lessen competition." 15 U.S.C. § 13(a) (emphasis added); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). The Supreme Court has interpreted this portion of the statute as requiring an antitrust plaintiff to show only "a reasonable possibility that a price differential may harm competition." *Falls City Indus., Inc. v. Vanco Beverages, Inc.*, 460 U.S. 428, 434-35 (1983) (citing *Corn Prods. Refining Co. v. FTC*, 324 U.S. 726, 742 (1945)). For price discrimination antitrust claims, since *Morton Salt* it has been permissible to infer harm to competition from evidence of harm to competitors. *Morton Salt*, 334 U.S. at 50. The Supreme Court recently reaffirmed "*Morton Salt*'s 'self-evident' inference." *Falls City*, 460 U.S. at 436 (quoting *Morton Salt*, 334 U.S. at 46, 50-51).

> In *Morton Salt* this Court held that, for the purposes of § 2(a), injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time. (citations omitted) In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits.

Falls City, 460 U.S. at 435. Thus, in order for a plaintiff to prove competitive injury under Robinson-Patman, he need only show that a substantial price discrimination existed as between himself and his competitors over a period of time. In fact, Hasbrouck not only offered evidence demonstrating that a substantial price discrimination existed but also other evidence that harm to competition would be the likely result—as well as direct evidence of displaced sales.

It is undisputed that a price differential existed between the rate Texaco charged Hasbrouck and the rate it charged Dompier and Gull. Furthermore, there was evidence that the price

differential was substantial and that it was in effect for several years. There can be little doubt that Texaco's pricing policy constituted price discrimination that was unlawful unless it could be justified under the Act. However, as discussed above, there was sufficient evidence to permit the jury to find that the price differential did not represent a legitimate functional discount and that all or a portion of the discount received by Dompier and Gull was passed on to Hasbrouck's competitors. On appeal Texaco has not pursued any other possible justification for its pricing policy. Thus, there was sufficient evidence to permit the jury to conclude that competition may have been harmed, *i.e.*, that there was "a reasonable possibility"[6] that a competitive injury had occurred. See *Falls City*, 460 U.S. at 434-35.

There was in addition considerable specific evidence supporting the conclusion that Texaco's unwarranted pricing policies adversely affected competition. Several witnesses testified that the retail gasoline market was strongly price sensitive, and that a small price advantage reflected in lower retail prices would generate significant swings in customers and sales. Others testified that the plaintiffs lost customers and sales directly to Dompier and Gull stations, that the customer switches resulted from the differences in retail prices between the stations, and that the plaintiffs would have recovered these lost revenues had they received as little as a two or three cents per gallon discount and been able to reduce their pump prices commensurately. This evidence is probative of the fact that the unwarranted price advantages which some Gull- and Dompier-supplied retailers received had a deleterious effect upon the market.

B. *Proof of Antitrust Injury Under Section 4*

Texaco also challenges the jury's award of damages under section 4 of the Clayton Act. To recover damages under section 4, a plaintiff must show (1) a violation of the antitrust laws, (2)

6 The district court in fact instructed the jury that plaintiffs needed to "establish by a preponderance of the evidence that the effect of the discrimination in price . . . had the reasonable *probability* of substantially lessening competition, or of injuring or destroying or preventing competition." (emphasis added).

an actual injury of the type contemplated by the statute that is caused by the violation, and (3) the amount of damages suffered as a result. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-89 (1977). In this section, we address the second requirement.

Texaco contends that Hasbrouck failed to prove that it suffered an actual injury that the antitrust laws were designed to prevent. It also contends that there was no direct causal connection between any such injury and Texaco's unlawful conduct because of the existence of several intervening causes, *i.e.*, the independent pricing decisions by Dompier and Gull, their customers, and the plaintiffs.

Under section 2(a), all that is required to establish illegal price discrimination is proof that competitive injury *may* result. Once such a showing is made, the plaintiff is entitled to an injunction preventing defendant from engaging in the anticompetitive conduct. However, in order for a plaintiff to recover damages under section 4 he must make some showing of actual injury and causation. The Supreme Court has described these two requirements collectively as "antitrust injury."

> Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research[, Inc.]*, 395 U.S. [100,] 125 [(1969)].

Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. at 489 (emphasis in original); see *J. Truett Payne*, 451 U.S. at 562. Here, in order for Hasbrouck to prove actual injury, he must show that he lost sales and profits as a result of Texaco's anticompetitive conduct.

With respect to Texaco's assertion that intervening causes broke the chain of causality, we have recognized that *Bruns-*

wick requires a plaintiff to show "more than that it suffered injury causally linked to the antitrust violation; the injury must be shown to have 'flowed' from the wrong. . . . To be one of several causes is not enough. The injury must be of the type likely to be caused by the defendant's [antitrust violation]." *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); *see Brunswick*, 429 U.S. at 489. However, *Handgards* does not stand for the proposition that the violation must be the sole cause of the injury. "It is enough that the illegality is shown to be a material cause . . . a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." *Zenith Radio v. Hazeltine Research*, 395 U.S. at 114 n.9. In fact, in *Zenith Radio*, the Court permitted causality to be inferred from circumstantial evidence because the injury involved was "precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause." *Id.* at 125. *See Brunswick*, 429 U.S. at 487-89; *Handgards*, 601 F.2d at 997. While a defendant may introduce evidence of alternative causes of the injury, such evidence constitutes only a part of the information the jury may consider in determining whether price discrimination was or was not a material cause. "If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury." *Perkins v. Standard Oil*, 395 U.S. at 648.

[10] Here, the plaintiffs presented substantial evidence to show that the injuries they suffered were precisely the type that would result from unlawful price discrimination and that they flowed from the anti-competitive conduct. Several of them testified as to diverted sales and lost profits; there was documentary evidence of increases in Dompier's sales volume over the same time period. Plaintiffs also testified that they would have recouped the lost revenues had they received a price break on their purchases of gasoline from Texaco. In addition, former customers testified that they had switched service stations because of the lower prices charged by stations supplied by Dom-

pier or Gull.[7] We believe, as did the district court, that sufficient evidence was introduced to support the finding that Hasbrouck suffered an antitrust injury and that Texaco's unlawful price discrimination was a material cause of that injury.[8]

C. *Proof of Damages Under Section 4*

[11] Texaco also challenges the jury's damages award contending that Hasbrouck failed to present sufficient proof of the amount of damages. Texaco first argues that the district court improperly allowed the jury to consider the higher price charged Hasbrouck—the overcharge—in its calculation of damages, and that this was an improper measure of damages as a matter of law. Damages resulting from illegal price discrimination may not be measured merely by determining the overcharge to the disfavored buyer, *i.e.*, the excess paid by the disfavored buyer for the goods it purchased. *J. Truett Payne*, 451 U.S. at 557. In rejecting automatic damages in favor of proof of the actual damages incurred, the Court in *J. Truett Payne* stated that "damages could be awarded on the basis of plaintiff's estimate of sales it could have made absent the violation." *Id.* at 565 (citing *Zenith Radio*, 395 U.S. at 123-24 (dam-

7 Further evidence was submitted to show that Texaco management was fully aware of the existing pricing practices and the negative effect such practices were having on direct supplied retailers. This evidence strengthens the causal connection between Texaco's violations and the damage suffered by Hasbrouck. *See Perkins v. Standard Oil*, 395 U.S. at 649.

8 We note that, in any event, at least two of the three "intervening causes" referred to by Texaco—the facts that Dompier and Gull made independent pricing decisions, and that their customers did so—are inadequate as a matter of law. In essence, Texaco argues that a defendant may avoid Robinson-Patman liability simply by showing that the recipients of the unlawful discount, or their customers, independently set their resale prices. That view would preclude all Robinson-Patman claims involving secondary and tertiary line injury, since the antitrust laws do not permit sellers to dictate the resale prices charged by their customers. *E.g.*, *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980). Texaco's argument is directly contradicted by a long line of Robinson-Patman cases that have found wholesalers liable for unlawful price discounts passed on to their customers. *E.g.*, *Morton Salt*, 334 U.S. at 37; *Perkins v. Standard Oil*, 395 U.S. at 642; *Falls City*, 460 U.S. at 428.

ages may be based on "evidence of the decline of prices, profits and values")).

There is no evidence that the jury based its damages award on an overcharge theory. In an attempt to estimate lost sales resulting from Texaco's pricing differentials, Hasbrouck's expert presented a market analysis that compared Hasbrouck's actual prices, volume and profits to its estimated amounts had the price discrimination not occurred. The expert arrived at the estimated figures using six economic projections based on different underlying assumptions, some of which assumed that Texaco eliminated the differential by raising its price to Dompier and Gull, while others assumed that Texaco lowered its price to Hasbrouck.

Texaco attempts to characterize these projections as representative of overcharge and undercharge theories, then argues that the jury was impermissibly shown evidence of an overcharge. This argument is not persuasive. None of the projections estimated Hasbrouck's damages by measuring the amount of the overcharge. The various projections simply permitted the jury to compare estimates of damages in different market situations, allowing them to determine what Hasbrouck's sales and profits would have been in the absence of price discrimination. Obviously, such a determination necessarily entails postulating the elimination of the price differential, either by increasing the favored buyer's price, decreasing the disfavored buyer's price, or a combination of the two. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, *reh'g denied*, 327 U.S. 817 (1946). In any case, as the trial judge stated in his opinion, any danger that the jury might use the overcharge theory to award automatic damages was offset by his contrary oral admonition and the jury instructions. Hence, the admission into evidence of Hasbrouck's damage projections does not provide grounds for reversal. *See United States v. Gwaltney*, 790 F.2d 1378, 1382 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1337 (1987).

Second, Texaco argues that Hasbrouck's damages theory was speculative and internally inconsistent. The burden of proving damages in an antitrust case is, as a matter of necessity, not "unduly rigorous," because "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation

would have been in the absence of the defendant's antitrust violation." *J. Truett Payne*, 451 U.S. at 565-66; *see Zenith Radio*, 395 U.S. at 123-24; *Bigelow*, 327 U.S. at 264. Accordingly, a plaintiff's burden of proving antitrust damages is "to some extent lightened" once a violation is established, and the jury is allowed to approximate the amount of damages. *J. Truett Payne*, 451 U.S. at 567-68.

In this case, Hasbrouck submitted a market analysis which estimated lost profits six different ways. Such evidence is clearly comparable to that accepted by the Court in *Bigelow*, where the plaintiffs estimated damages by comparing their actual profits to their profits immediately before the violation, and to the profits of a competitor who was not subject to the violation. *See Bigelow*, 327 U.S. at 257-59. *Cf. Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 582 (5th Cir. 1982), *cert. denied*, 459 U.S. 908 (1982) (on remand from Supreme Court, damage award held insupportable because plaintiff failed to offer any evidence that its retail prices differed from those of its competitors, who allegedly received an unjustified discount). Hasbrouck's evidence was sufficient to support the jury's damage award.

Finally, Texaco claims the jury's damages award was excessive because it exceeded the total presented in the Hasbrouck's expert's analysis. We will not disturb an award of damages unless it is clearly unsupported by the evidence. *Chalmers v. City of Los Angeles*, 762 F.2d 753, 760 (9th Cir. 1985). An otherwise supportable damage verdict will be affirmed unless it is "grossly excessive" or "shocking to the conscience." *Id.* The award here was substantially equivalent to the amount of damages estimated in Hasbrouck's market analysis and does not appear to be grossly excessive. We, therefore, reject Texaco's argument.

D. *Adequacy of the Jury Instructions*

[12] Texaco claims the jury instructions evidence reversible error on the part of the district court. The trial court has broad discretion in formulating jury instructions and will be reversed only upon a showing of an abuse of discretion. *United States v.*

Wellington, 754 F.2d 1457, 1463 (9th Cir.), *cert. denied*, 106 S. Ct. 593 (1985). So long as the instructions on each element of the case are adequate to ensure that the jury fully understands the issues, no particular formulation or wording is necessary. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1398 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984). A defendant is entitled to an instruction on a defense theory if it has a basis in the law and in the record. *United States v. Coin*, 753 F.2d 1510, 1511 (9th Cir. 1985). The failure to submit a proper jury instruction is a question of law reviewed *de novo*, *999 v. C.I.T. Corp.*, 776 F.2d 866, 871 (9th Cir. 1985), but subject to the harmless error rule. See *Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1337 (9th Cir. 1985).

First, Texaco argues that the jury should have been expressly instructed that actual injury is a prerequisite to recovery of treble antitrust damages. The district court did just that when it instructed the jury that Hasbrouck had the burden of proving by the preponderance of the evidence that he "was injured in his property or business by reason of [price] discrimination."

Second, Texaco asserts that the court failed specifically to instruct the jury that the injury proven must be to competition, and not merely to competitors. In its persistent obfuscation of the competition-competitor point, Texaco blurs the fact that proof of potential injury to competition under section 2(a) must be distinguished from a plaintiff's additional burden of proving actual injury and damages under section 4. Injury to the specific plaintiff is the sine qua non of a section 4 claim, once injury to competition has been established. The challenged instructions correctly addressed this point. Separate instructions properly set forth the plaintiffs' obligations as to both sections 2(a) and 4. There is no need to include a specific instruction differentiating between competition and competitors. Viewed as a whole, the district court's instructions were more than adequate to ensure that the jury understood the issues. *See Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1398.

Texaco next contends that the trial judge erred by not expressly instructing the jury as to the distinction between an undercharge and an overcharge theory of discrimination. However, the trial court instructed the jury that it was not permissible to determine the amount of Hasbrouck's damages "merely by determining the price difference between the favored and disfavored buyers and multiplying that figure by the number of gallons involved." This instruction correctly described and rejected the overcharge theory. The fact that the trial judge did not use the exact words requested by Texaco does not support a finding of abuse of discretion. *See Los Angeles Memorial Coliseum Comm'n*, 726 F.2d at 1398.

Finally, Texaco alleges that it was improper for the district court to instruct the jury that each of several factors may be a proximate cause of an injury, and that the court refused a requested instruction on intervening causes. These allegations essentially repeat Texaco's claim that Hasbrouck failed to prove proximate cause because of the remoteness of the injury from the price discrimination. As discussed earlier, an antitrust plaintiff need only show that the violation is a material cause of his injury, not that it is the only cause. *Zenith Radio*, 395 U.S. at 114 n.9, 125; *see Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980). The trial judge correctly stated the law in his proximate cause instruction which specified that the violation must "play a substantial part" in causing the injury. *See Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292, 304 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978). Further, while jury instructions did not mention the phrase "intervening causes," they did specify that the injuries had to be "a direct result or a reasonably probable consequence" of the violation, or put another way, that the damages suffered must be "by reason of the violations of the antitrust laws." *See Handgards*, 601 F.2d at 997. Taken as a whole, the instructions made it clear that damages must "flow" from the violation. Therefore, the district court did not err in refusing the requested instruction.

C. *Texaco's Allegation of Judicial Bias*

[13] Texaco requests a new trial because of an alleged judicial bias in favor of Hasbrouck. A judge is required to disqualify himself if his impartiality might reasonably be questioned,

or if he has a personal bias or prejudice for or against a party. 28 U.S.C. §§ 455(a), 455(b)(1).[9] The bias must stem from an extrajudicial source and not be based solely on information gained in the course of the proceedings. *In re Beverly Hills Bancorp*, 752 F.2d 1334, 1341 (9th Cir. 1984). However, Texaco points to no extrajudicial basis for the alleged bias and in fact offers no evidence that the trial judge acted in less than a wholly impartial manner. Texaco supports its allegations of bias merely by pointing to alleged errors at trial in refusing a request to disqualify jurors, formulating preliminary and final jury instructions, and overruling defense objections. Even if these ruling were erroneous, and we do not suggest that they were, they could not justify a finding of judicial bias. Texaco's claim of judicial bias is wholly without merit.

III. *Conclusion*

Substantial evidence supports the jury findings regarding Texaco's liability and the award of damages. Furthermore, we find the district court's jury instructions sufficient to ensure that the jury fully understood the issues. Because the evidence permitted the jury reasonably to conclude that Hasbrouck was entitled to a favorable verdict, the district court properly denied Texaco's motion for j.n.o.v. We further find no abuse of discretion in the district court's denial of Texaco's motion for a new trial.

AFFIRMED.

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9 Recusal is also required for personal bias or prejudice under 28 U.S.C. § 144. This section, however, requires the timely filing of an affidavit alleging such bias. Because no affidavit was filed by Texaco, section 144 is not applicable.

Although it is unsettled what timeliness requirements apply to section 455, it is clear that a party must have a legitimate excuse, such as newly discovered evidence, for failure to raise the issue at the trial level. *United States v. Conforte*, 624 F.2d 869, 879-80 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980). In this instance, we assume *arguendo* that Texaco's assertion of judicial bias in its motion for j.n.o.v. was sufficient to preserve the issue for appellate review.

APPENDIX B

Opinion and Order of the United States District Court for the Eastern District of Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. C-76-027-JLQ

RICKY HASBROUCK, d/b/a RICK'S TEXACO, et al.,

Plaintiffs

vs.

TEXACO, INC., a foreign corporation,

Defendant

MEMORANDUM OPINION AND ORDER DENYING MOTION FOR JNOV OR NEW TRIAL

AS SCHEDULED, this matter came on for oral argument in Spokane, Washington on August 14, 1985. Plaintiffs were represented by Robert Whaley and Lucinda Whaley. William Fremming Nielsen, Randall Robinson, Mark Litvack and Ira Sacks appeared on behalf of the defendant.

Upon consideration of the record and the oral presentations of counsel, the court rules as follows: defendant's motion for judgment notwithstanding the verdict or a new trial (Ct. Rec. 739) is DENIED.

DISCUSSION

A. *Judgment Notwithstanding The Verdict:*

Pursuant to Fed. R. Civ. P. 50(b), Texaco asks this court to set aside the verdict and enter judgment in accordance with its

motion for directed verdict.[1] Such a motion may be granted only if the jury's verdict is not supported by substantial evidence. *Los Angeles Memorial Coliseum Com'n v. National Football League*, 726 F.2d 1381, 1392 (9th Cir. 1984). Stated another way, a judgment notwithstanding the verdict is appropriate when the evidence permits only one reasonable conclusion as to a verdict and the jury's verdict is inconsistent with that conclusion. *See Walker v. KFC Corp.*, 728 F.2d 1215, 1223 (9th Cir. 1984). In making that analysis, this court is prohibited from considering witness credibility or weighing the evidence but must view the evidence in the light most favorable to the plaintiffs. *Los Angeles Memorial Coliseum Com'n v. National Football League*, 726 F.2d at 1392. Applying those principles to each of the four grounds asserted in defendant's motion, the court concludes the verdict must stand.

1. *Price differentials as "functional discounts":*

A "functional discount" is a traditional technique used in business pricing practices. Sawyer, *Business Aspects of Pricing Under the Robinson-Patman Act* (1963). A functional discount occurs where a buyer is permitted to purchase a product for a lower price than another buyer because of the different levels of distribution occupied by the buyers or because the buyers perform different functions in the seller's marketing system.[2] The

1 The reasons set forth in this opinion for denying Texaco's JNOV motion are also intended to supplement the court's oral ruling denying defendant's motion for a directed verdict.

2 Some economists and commentators have distinguished between the terms "functional discount" and "trade discount." *See Boise Cascade Corp.*, Docket No. 9133, slip op. at 99-100 (Feb. 14, 1984) (initial decision); Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. & Comm. L. Rev. 543, 545 n.9 (1976). Technically, a "functional discount" disregards the buyer's level in the distribution scheme and rewards the buyer for actually performing functions which otherwise would be performed by the seller. A "trade discount", on the other hand, is given to a buyer based upon the buyer's level in the distribution scheme and is completely independent of the functions performed by the buyer. Thus, a "trade

primary justification for the discount is to compensate the buyer for its cost of performing functions ordinarily performed by the seller.[3] Generally, functional discounts do not trigger Robinson-Patman Act liability either because the buyer who receives the discount and the buyer who does not are on different trade levels (and therefore are not competitors) or because the discount merely offsets the competing buyer's additional costs incurred in performing the seller's functions. In other words, if the buyers do not function at the same level the requisite "competitive injury" is unlikely. Similarly, if the discount merely offsets the buyer's additional costs, it is unlikely the buyer's condition would be enhanced enough to cause an injury to competition. Thus, the critical question in determining the legality of a functional discount is whether the price differential has an adverse effect on competition; if it does, and conventional defenses are absent, the discount violates the Act. 3 Kintner, *Federal Antitrust Law* 308 (1983) ("underlying inquiry . . . : is there injury to competition?"); Antitrust Section, Monograph No. 4, *The Robinson-Patman Act: Policy and Law, Volume I* 54 (1980) (legality of functional discounts "depends upon the absence of adverse competitive effects"); Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. &

discount" should be available to all buyers who operate at the same trade level regardless of the actual functions performed and a "functional discount" should be available to any buyer—regardless of its trade level—who performs functions for the seller. Although defendant Texaco has not made this distinction, and it is questionable whether the distinction is of any legal importance, *see* Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L.J. 929, 936 (1985), the thrust of defendant's argument appears to fall within the parameters of functional discount in its more limited, technical sense, *i.e.*, that Dompier and Gull were performing functions which Texaco would otherwise have performed.

3 The functional discount concept is distinguished from the cost justification defense, 15 U.S.C. § 13(a), in that the former focuses on the buyer's cost of performing the seller's functions and the latter is concerned with comparing the seller's costs of servicing one buyer versus the cost of servicing another buyer. Understandably, many commentators, including a chairman of the A.B.A.'s Robinson-Patman Act Committee of the Section of Antitrust Law, find it a "confusing distinction." Panel Discussion—Questions and Answers, 53 Antitrust L.J. 967, 968 (1985) (comment by Bernat Rosner).

Comm. L. Rev. 543, 546 (1976) (legitimacy of functional discounts "depends on the absence of an anti-competitive effect"); *Mueller Company*, 60 F.T.C. 120, 129 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *quoting General Foods Corporation*, 52 F.T.C. 798 (1956) (the Robinson-Patman Act permits "lower prices to one functional class as against another, provided that injury to commerce as contemplated by the law does not result . . ."); *Doubleday and Company, Inc.*, 52 F.T.C. 169, 207 (1955) ("traditional [functional] discounts . . . remained lawful under the Robinson-Patman Act unless engendering adverse effects on competition . . ."); *cf. FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1027 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1097, 97 S. Ct. 1116, 51 L. Ed. 2d 545 (1977) ("[w]e do not suggest or imply that . . . a price discount to . . . wholesalers . . . which has the purpose or effect of defeating the objectives of the Act" is beyond the scope of the Act).

Even without viewing the evidence in the light most favorable to the plaintiffs, the preponderance of the evidence produced in this case demonstrated that Texaco's functional discounts adversely affected competition. That result was brought about primarily by two reasons. First, since Texaco engaged in dual distribution, *i.e.*, sold to both retailers and distributors, the plaintiffs and the favored buyers were not always in competition.[4] That absence of competition, however, does not negate competitive injury, where, as here, the disfavored buyer competes with the favored buyer's customers. As the Supreme

4 Prior to 1974 Dompier Oil Co. did not operate any retail stations but, as a distributor, sold Texaco gasoline to retail stations. Beginning in 1974 Dompier did acquire retail outlets and eventually operated four Texaco retail stations. While there is a serious question as to whether Dompier was entitled to a "functional discount" on the gas it *resold at retail, compare Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923, 84 S. Ct. 1219, 12 L. Ed. 2d 215 (1964) (entitlement to functional discount based on resale level) *with Doubleday and Co.*, 52 F.T.C. 169 (1955) (entitlement to functional discount based on level of purchase), the court assumes, *arguendo*, that the mere fact that Dompier retailed the gas does not preclude a "functional discount." *See Boise Cascade Corp.*, Docket No. 9133 (Feb. 14, 1984) (initial decision) (Administrative Law Judge urges adherence to *Mueller* rule).

Court recently confirmed, a Robinson-Patman Act violation may occur even though the favored and disfavored buyers are not competitors. *Falls City Industries v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983) (competition was between *customers* of favored buyers and *customers* of disfavored buyers). The record in this case contains substantial evidence that the favored purchasers' (or their customers') lower retail prices attracted customers away from the plaintiffs and that the lower prices were the major reason for the diverted sales. Such evidence more than establishes injury to competition. *Falls City Industries v. Vanco Beverage, Inc.*, 460 U.S. at 437-38, *citing J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561-62 (1981).

Secondly, the functional discounts negatively affected competition because they were, in part, reflected in the favored purchasers' (or their customers') retail prices. In other words, the discount was not consumed or absorbed at the level of the favored buyers; rather, the amount of the discount (or a significant portion) appeared in the favored purchasers' retail price, or in the favored purchasers' price to their customers and in their customers' retail prices. Under such circumstances, the otherwise innocuous nature and presumed legality of functional discounts is rebutted, for it is universally recognized that a functional discount remains legal only to the extent it acts as compensation for the functions performed by the favored buyer. *See* 3 Kintner, *Federal Antitrust Law* 309-10 (1983); Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L.J. 929, 939-41 (1985). The discount must "be reasonably related to the expenses assumed by the [favored] buyer" and the discount "should not exceed the cost of . . . the function [the favored buyer] actually performs . . ." *Doubleday and Company*, 52 F.T.C. at 209, *cited* in *Boise Cascade Corp.*, Docket No. 9133, slip op. at 117 (Feb. 14, 1984) (initial decision). If the discount exceeds such costs, it cannot be justified as a functional discount, particularly where, as here, the excess has a negative effect on competition.

In this case Texaco made no serious attempt to quantitatively justify its functional discounts. While a precise accounting of the value of the performed functions is not mandated, merely

identifying some of the functions is not sufficient.[5] There is no substantial evidence to support Texaco's position that the discounts were justified. In fact, the preponderance of the evidence points to the contrary: had the amount of the discounts been merely reimbursement for the value of the services performed by the favored buyers, it is improbable that the discounts (or a portion) could have been passed along and been reflected in the retail price. Consequently, the price differential and its resultant impact on competition cannot be legitimized under the rubric of functional discount.

2. *Competitive Injury:*

To prove a violation of the Robinson-Patman Act, a plaintiff must, *inter alia*, establish that the effect of the price differential "*may be* substantially to lessen competition." Section 2(a). The Act "does 'not require that the discriminations must in fact have harmed competition.' " *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 562, *quoting Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742, 65 S. Ct. 961, 969, 89 L. Ed. 1320 (1945). Rather, a plaintiff must only show "a reasonable possibility that a price difference may harm competition." *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. at 434-35. That "reasonable possibility of harm is often referred to as *competitive injury.*" *Id.* (emphasis added).

As stated earlier, it is not necessary that there be injury to competition between the favored and disfavored buyer; the Act also encompasses the injury to competition between the disfavored buyer and the favored buyer's customers. *See Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. at 436. Accordingly, as there was substantial evidence that the plaintiffs competed with Dompier-supplied retail stations,[6] and the Gull

5 Although Texaco did introduce evidence that Dompier and to some extent Gull were performing marketing and advisory functions, the gasoline hauling function cannot be considered, at least to the extent it was compensated for by the hauling allowance, since the court excluded the hauling allowance from the price differential.

6 The term "Dompier-supplied retail stations" includes any stations supplied by Dompier, including Dompier's own retail outlets.

stations, the requisite injury could occur in the competition between plaintiffs and those stations.

In a highly competitive market like retail gasoline where customers are influenced by small price differences, substantial price discrimination over a significant period of time raises an inference of competitive injury. *See FTC v. Morton Salt Co.*, 334 U.S. at 46, 50-51. Absent direct evidence of displaced sales, however, "this inference may be overcome by evidence breaking the causal connection between the price differential and lost sales or profits." *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. at 435. But, where the record reveals that the price discrimination as between the favored and nonfavored buyer affects prices to the extent of diverting sales, the plaintiff has "more than established the competitive injury required for a prima facie case under § 2(a)." *Id.* at 437-38. The record presented in this case contains substantial evidence that the price discrimination was substantial, that it existed over a significant period of time and that it resulted in the diversion of sales from the plaintiffs to the Dompier-supplied retail stations. The plaintiffs proved diverted sales and the defendant did not produce substantial evidence breaking the causal connection between the diverted sales and the price differential. Therefore, the competitive injury element was established.

3. *Antitrust Injury:*

In addition to proving a prima facie violation of the Act, a plaintiff seeking treble damages "must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 562. In other words, the plaintiff must show that he was in fact injured, that the injury is of the type the Act was intended to prevent, and that the injury is causally connected with the violation of the Act. *See California Computer Products v. International Business Machines*, 613 F.2d 727, 732 (9th Cir. 1979). Such an injury is referred to as "antitrust injury." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

The plaintiffs' burden of proving the fact of injury is satisfied by proof of some damage flowing from the unlawful price discrimination. *See Zenith Corp. v. Hazeltine*, 395 U.S. 100, 114 n.9 (1969); *California Computer Products v. International Business Machines*, 613 F.2d at 732. Although it is not enough that the price discrimination was merely one of several causes, *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979), the plaintiff "need not exhaust all possible alternative sources of injury"; it is enough that the violation of the Act "is shown to be a *material cause* of the injury." *Zenith Corp. v. Hazeltine*, 395 U.S. at 114 n.9 (emphasis added); *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891, 903 (3d Cir. 1985). The plaintiff must prove "with a fair degree of certainty that the defendant's illegal conduct *materially contributed* to his injury." *Affiliated Capital Corporation v. City of Houston*, 735 F.2d 1555, 1564 (5th Cir. 1984) (emphasis added). The plaintiffs here produced a substantial quantum of evidence that they suffered lost sales and profits as a result of their competitors' lower retail prices which were occasioned by the unlawful price discrimination. That proof was more than enough to establish the connection between their injury and the defendant's violation of the Act.

There can be little question that the plaintiffs' injuries are of the type "the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. at 562. As is often repeated: "[t]he antitrust laws . . . were enacted for 'the protection of *competition* not *competitors*.' " *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 488, *quoting Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Thus, "the primary purpose of the [Robinson-Patman] Act is to protect the competitive process, not individual competitors." *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 729 F.2d 676, 680 (10th Cir. 1984). The injuries suffered by these plaintiffs were their lost sales and profits brought about by their inability to compete with the favored purchasers' customers, the very "injury the Robinson-Patman Act was intended to prevent." *World of Sleep, Inc. v. La-Z-Boy*, 756 F.2d 1467, 1480 (10th Cir. 1985). Clearly, as here, when twelve independent businesses operating in the same general market are unable to compete due to price discrimination, the competitive process, *i.e.*, competition, has indeed been injured.

4. *Meeting Competition:*

To overcome its burden to establish the "meeting competition" defense, Texaco was required:

> . . . at least to show the existence of facts that would lead a reasonable person to believe that the seller's lower price would meet the equally low price of a competitor; it also requires the seller to demonstrate that its lower price was a good faith response to a competitor's lower price.

Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. at 451. Obviously, that standard is a factual one and whether it is met depends " 'on the facts and circumstances of the particular case, not abstract theories or remote conjectures.' " *United States v. United States Gypsum Co.*, 438 U.S. 422, 454 (1978), *quoting Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963). Although Texaco did present some evidence in support of its meeting competition defense, that evidence was controverted.[7] Apparently, the jury concluded Texaco did not overcome its burden, and this court is unable to conclude that the meeting competition evidence demanded a contrary result or that the jury's verdict is unsupported by substantial evidence.

B. *New Trial:*

This court is empowered to grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a). Reasons warranting a new trial are if the jury's verdict was "clearly contrary to the weight of the evidence," *William Inglis v. ITT Continental Baking Co.*, 609 F.2d 1014, 1027 (9th Cir. 1981), "fundamentally unfair," *Alma v. Manufacturers*

7 Although Texaco did put forth some evidence that its pricing practices in the early 1970's (particularly as regards Gull) were motivated by competition, scant evidence was produced that the "competitive circumstances" justified a continuation of the lower price in subsequent years. *See Falls City Industries v. Vanco Beverage, Inc.*, 460 U.S. at 450.

Hanover Trust Co., 684 F.2d 622, 625 (9th Cir. 1982), or was a "miscarriage of justice." *Peacock v. Board of Regents*, 597 F.2d 163, 165 (9th Cir. 1979). In making the determination as to whether any such reason exists, the court must exercise its "sound discretion." *Philippine National Oil Co. v. Garret Corp.*, 724 F.2d 803, 805 (9th Cir. 1984). In so doing, the court "may properly consider the credibility of the witnesses and the weight of the evidence." *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978). Applying those principles to the new trial grounds asserted by Texaco, the court concludes a new trial is not warranted.

1. *Damages:*

It is now settled that a plaintiff seeking damages for violation of the Act may not simply look to the amount of discrimination as the measurement of those damages. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S. Ct. 1923, 75 L. Ed. 2d 174 (1981). The compensable harm is the economic harm suffered as the result of the discrimination and the amount of the discrimination, without more, "does not indicate the amount of lost sales or profits." *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 582 (5th Cir. 1982). But, once a plaintiff has proven an "antitrust injury," a lesser burden is faced in quantifying the damages. *See J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. at 565-67; *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 435 (5th Cir. 1985) ("Under this relaxed burden, a jury verdict may stand on less evidence than is normally required to support a damage award in civil cases"); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1525 (10th Cir. 1984) (relaxed standard is justified because "an antitrust plaintiff is rarely able to prove its damages with mathematical precision"); ABA Antitrust Section, *Antitrust Law Developments* 409 (1984) ("the burden of proving the amount of damages is less than that required for proving the fact of damage"). Nevertheless, the plaintiff must put forth substantial evidence from which the trier of fact can determine the amount of damages from "a just and reasonable estimate of the damage based upon relevant data." *Bigelow v.*

RKO Radio Pictures, 327 U.S. 251, 264 (1946). That estimate, however, may not be the result of "speculation or conjecture." *Id.*

Texaco argues that much of plaintiff's damage evidence is irrelevant. Specifically, the defendant asserts that any damage estimate based upon a hypothetical lower price to plaintiffs is improper. The basis for Texaco's contention is that a damage estimate based on lowering plaintiffs' purchase price assumes that the price was unlawfully high, *i.e.*, that plaintiffs were "overcharged." According to Texaco, the Robinson-Patman Act is not concerned with whether the plaintiffs paid too much for their gasoline but whether their competitors paid too little. Put another way, the defendant categorizes the Act as proscribing "undercharges" not "overcharges."

In the context of Robinson-Patman Act cases, the undercharge-overcharge theory apparently had its genesis in *Enterprise Industries v. Texas Company*, 240 F.2d 457 (2d Cir. 1957), *cert. denied*, 353 U.S. 965, 77 S. Ct. 1049, 1 L. Ed. 2d 914 (1957). In *Enterprise*, Judge Learned Hand rejected the notion that a Robinson-Patman Act violation would automatically lead to damages in the amount of the price discrimination. *Id.* at 458-60. Since "the wrong was in selling gasoline to the nine Texaco competitors at a *lower price* than to the plaintiff," *id.* at 458 (emphasis added), Judge Hand concluded that the question of damages (the existence and amount thereof) must focus on the consequences of the *lower price*, not merely the price differential.

Although the Ninth Circuit rejected Judge Hand's approach, *Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012, 90 S. Ct. 571, 24 L. Ed. 2d 503 (1970), at least one distinguished commentator wholeheartedly endorsed it and advocated its universal acceptance. Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—the Twenty-Third Antitrust Review*, 71 Colum. L. Rev. 1, 31-35 (1971) (hereinafter cited as Handler, *Twenty-Third Review*). As then-Professor Handler put it:

> Those who adopt an automatic damages rule view the plaintiff's injury as in the nature of an overcharge. Ac-

> cording to them, he has paid more than he should lawfully have paid and, accordingly, should recover as damages the amount of the unlawful exaction. After all, one who is victimized by a price-fixing conspiracy may recover the full amount of the overcharge without regard to any possible recoupment (or pass-on) by raising his resale prices. Why should the victim of a discriminatory overcharge fare worse?
>
> The answer is that the Robinson-Patman plaintiff, unlike the purchaser of price-fixed goods, has not been overcharged at all. Had there been no violation of law, he would not necessarily have paid a lower price. The seller would have been free of any and all liability if he had charged others the same high price obtained from the plaintiff. In sum, the plaintiff is not entitled to a lower price, but only to parity with his competitor. That being so, his damages are not to be measured as though he were overcharged. Rather, to demonstrate that he was injured by the price differential, he must show damages flowing from the undercharge to his competitor.

Id. at 32.

Following the Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (private plaintiff must demonstrate "antitrust injury"), Milton Handler again attacked the Robinson-Patman Act automatic damages concept:

> *Brunswick* thus served to reaffirm *Enterprise*'s basic teaching: that cognizable injury to a section 2(a) case is to be traced not to the higher price paid by the plaintiff (the overcharge)—since the infraction is a price *difference* and all the law requires of the seller is a parity in pricing—but rather to the *undercharge* to plaintiff's competitor. Justice Cardozo, with characteristic felicity, put it this way in a different, but related, context: "The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less." Put in *Brunswick*'s terms,

> the fact that the disfavored purchaser pays more for the same product than the favored purchaser, while constituting a form of economic injury or harm to plaintiff's pocketbook, does not amount to "antitrust injury" or provide a proper measure of antitrust damages. On the other hand, "antitrust injury" is sustained where it can be shown that the favored competitor, by virtue of his lower cost, lowered his resale price so that the plaintiff either lost sales volume (if he did not meet this competition) or lost profits (if he did match the lower resale price). It is the harm from the discrimination, that is, the undercharge and not from the overcharge which constitutes antitrust injury in the *Brunswick* sense.

Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term--1977*, 77 Colum. L. Rev. 979, 993 (1977). As we all now know, Handler's insight proved to be in tune with the Court's thinking as evidenced by *Truett Payne*'s rejection of the automatic damage rule.

When the *Truett Payne* Court struck down the concept of automatic damages, in effect it did two things. First, it established that a disfavored buyer must prove it suffered an antitrust injury beyond merely having paid more for a product than the favored buyer; in other words, it may not look to the price differential as constituting the antitrust injury. Second, once the antitrust injury has been proven, it may not simply be measured by the amount of the price differential. The plaintiffs here have not violated either of those prohibitions. Here, the plaintiffs did not rely on the price differential to establish their antitrust injuries: their injuries were proven via evidence of diverted sales and lost profits causally connected to their competitors' *lower prices, i.e.*, from the "undercharge." *See* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term*—1977, 77 Colum. L. Rev. at 993. Moreover, the plaintiffs did not merely look to the amount of the price differential to quantify their damages; rather, they presented "just and reasonable" estimates of their lost sales and profits. *See Bigelow v. RKO Radio Pictures*, 327 U.S. at 264.

The rejection of the automatic damage concept must be distinguished from the way in which plaintiffs used their higher purchase price to estimate their damages. When a disfavored buyer sues for damages for a violation of the Act, "he should as a matter of standard remedial principles, be entitled to be placed in the same position he would have been in had there been no violation." Handler, *Twenty-Third Review* at 32. But, as the Court recognized in *Truett Payne*, "[t]he vagaries of the market place usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation." 451 U.S. at 566, 101 S. Ct. at 1929. In an attempt to present a picture as to what their sales and profits would have been "had there been no violation," the plaintiffs offered six different hypothetical scenarios in which there was no price discrimination. In four of those hypothetical models, the price differential between the plaintiffs and the favored purchasers was eliminated (either totally or partially) by reducing the plaintiffs' purchase price. By including a reduction-in-price-to-plaintiffs component in their model the plaintiffs are not contending that they were "overcharged"; rather, they have, in effect, postulated how Texaco would have responded had it been ordered to eliminate the price differential. Then the damage estimates for each model represent the difference between the plaintiffs' actual sales and profits and what their sales and profits would have been had Texaco responded as postulated in the model. It is a distortion and misapplication of the "overcharge-undercharge" concept for the defendant to argue that the only legally permissible model from which to estimate damages is one in which the favored buyer's price is increased.[8]

8 The fallacy of defendant's off-target argument is highlighted in the following hypothetical: Jake's Texaco and Jenny's Texaco are competing Texaco gasoline retailers in Free Marketville, U.S.A. They both are supplied by Texaco's tanker truck and their product-purchase price is identical and provides Texaco with a better than average profit margin. Being the only Texaco retailers in the market they have prospered and so has Texaco. Now, along come two new Texaco retailers into the market, Tom's Texaco and Terry's Texaco. They receive their gasoline in the same manner as Jake and Jenny, only Tom and Terry pay four cents per gallon more for their gas. Assuming that Tom and Terry eventually close their doors because they cannot compete, that they are able to prove a violation of the Act, that Texaco has no statutory defenses and that the plaintiffs prove "antitrust injury," under Texaco's argument the *only* way to remedy the violation would be to *increase* Jake and Jenny's purchase price. Surely, Tom and Terry are not foreclosed from calculating their damages based on the estimated profits they would have experienced had the price differential been eliminated by lowering their purchase price.

The plaintiffs' damage estimates are not based upon "speculation or conjecture." *See Bigelow v. RKO Radio Pictures*, 327 U.S. at 264, 66 S. Ct. at 579. At the core of plaintiffs' expert Dr. Leffler's damage calculations are his conclusions as to the correlations between the at-issue price differentials and plaintiffs' gasoline sales. To establish that correlation Dr. Leffler analyzed 1975-1978 price and sales data from some of the plaintiffs' stations and Dompier stations. From that data Dr. Leffler discovered a relationship between plaintiffs' gasoline sales and plaintiffs' retail prices vis-a-vis Dompier's retail prices. That relationship became the basis of Dr. Leffler's damage computations throughout the entire 1972-1981 period. Although defendant's expert Dr. Barron attacked Dr. Leffler's methods and assumptions, this court is unable to conclude that Dr. Leffler's analysis is improper as a matter of law or that it is too conjectural. Furthermore, the jury apparently accepted a significant portion of Dr. Leffler's analysis, and this court concludes their verdicts were not contrary to the weight of the evidence. None of the verdicts was excessive and each "could reasonably have been reached," and, therefore, should be accepted. *Raynor Brothers v. Cyanamid Co.*, 695 F.2d 382, 385 (9th Cir. 1982).

2. *Admission of Exhibit 912:*

An evidentiary ruling is grounds for a new trial only if refusal to grant a new trial would be "inconsistent with substantial justice." Fed. R. Civ. P. 61. Texaco argues that the court erred in admitting Exhibit 912 because it represents automatic damages in the amount of the price discrimination. While the relevance or probative value of such evidence is unclear since the Court's decision in *J. Truett Payne*, the danger of its admission, *i.e.*

that the jury would automatically award damages based upon the amount of discrimination, was alleviated by the court's oral admonitions and instructions to the jury. *See, e.g.*, Ct. Rec. 721 at Instruction No. 28. Thus, it does not appear that the admission of Exhibit 912 "caused substantial harm" to Texaco and, consequently, a new trial is not warranted. *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1137 (9th Cir. 1984).

3. *Jury's Questions:*

At the beginning of the second day of deliberations, the jury transmitted the following written questions to the court:

> Are we to conclude that the self-service gas stations coming into Spokane had nothing to do with loss of gallons to the plaintiff?
>
> Is the issue only that Dompier and Gull were sold gas cheaper?

Had the court answered either of those questions in the negative (as requested by Texaco) the court would have improperly assumed the role of fact-finder and/or advocate. The first question clearly raises a factual issue: the cause(s) of plaintiffs' lost sales was the subject of considerable evidence and argument during the trial. Similarly, had the court answered "no" to the second question, the court would have been, in essence, repeating a portion of defendant's closing argument. The answers to both inquiries rested exclusively within the province of the jury and the court's response kept them there.

Accordingly, the defendant has not set forth sufficient grounds to entitle it to a new trial.[9] The jury's verdicts are neither "contrary to the weight of the evidence," "fundamentally unfair" or "a miscarriage of justice." The verdicts are a reasonable resolution of a difficult case.

9 In addition to the new-trial grounds discussed above, the defendant asserts other grounds. Besides restating its four JNOV grounds as grounds for a new trial, Texaco also argues it is entitled to a new trial due to erroneous instructions. As regards the erroneous instructions ground, Texaco's "overcharge-undercharge," "actual injury to competition" and "proximate cause" arguments have been addressed. The defendant simply has not met either the JNOV standard or established adequate grounds for a new trial.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 11th day of September, 1985.

JUSTIN L. QUACKENBUSH
United States District Judge